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Public Prosecutor v Lan Yi Ling

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HIGH COURT (KOTA KINABALU) — CRIMINAL CASE NO BKI-45A-1/1 OF 2015
NURCHAYA ARSHAD J
30 NOVEMBER 2015

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Criminal Law — Dangerous drugs — Trafficking — Dangerous drugs found in rice cooker carried by appellant — Discrepancies in weight of drug exhibit — Whether drug exhibit produced at trial same as drug seized from accused — Whether there was break in chain of evidence relating to movement of drug exhibit — Whether prosecution had proven elements of charge against accused — Whether presumption under s 37(d) of the Dangerous Drugs Act 1952 applied against accused — Whether accused deemed to have possession of drug exhibit — Whether accused transporting drugs seized — Whether prosecution could invoke presumption of trafficking under s 37(da)(xvi) of the Act — Whether accused innocent carrier — Whether accused raised reasonable doubt on prosecution's case.

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Evidence — Exhibit — Drug exhibit — Discrepancies in weight of drugs stated in original charge and weight of drugs as analysed by chemist — Accused challenged identity of drug exhibit — Whether prosecution provided reasonable explanation for discrepancies in weight — Whether there was break in chain of evidence

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On 17 August 2014, the accused was on transit at the International Arrival Hall of the Kota Kinabalu International Airport ('KKIA') about to board a flight to Kuala Lumpur, when she was stopped by a customs officer on duty at the airport. The customs officer saw something suspicious when a box the accused was carrying was placed in the customs scanning machine. The contents of the box and the rice cooker that was in the box, were then examined. The officers of the customs department found a large quantity of crystalline substance in five black carbon paper packets concealed beneath the bottom part of the rice cooker. The contents of the said packets were later analysed by a chemist, who confirmed the contents to be 336g of methamphetamine ('the drug exhibit'). The appellant was arrested and charged for trafficking in 336g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The accused submitted that the unexplained difference between the gross weights of the drug exhibit seized by the customs officers and that of the chemist was sufficient to create a reasonable doubt to the prosecution case. Further, the accused submitted that there was a

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material discrepancy between the weights of the drugs stated in the original charge and the weight of the drugs as analysed by the chemist and that this created a reasonable doubt as to the identity of the drug exhibit. The prosecution explained that when the accused was initially brought before the magistrate the estimated weight of the drugs was 1,396g and the chemist report had yet to be issued. However, upon the issuance of the chemist report, which confirmed the weight of the drug exhibit to be 336g, the prosecution had amended the charge. At the close of the prosecution case, the trial judge found that the prosecution had established a prima facie case and called upon the accused to enter her defence. The accused denied any knowledge of the presence of drugs inside the box she was carrying. The premise of the accused person's defence was that she was asked by one Clitin, an African friend, to carry the box to Kuala Lumpur to be given to his elder brother on the pretense that the box contained clothes and accessories. In short, the accused claimed she was an innocent carrier.

Held, convicting the accused of the offence of trafficking and sentencing her to death:

(1) Once the identity of the drug exhibit was challenged by the accused, it became the burden of the prosecution to adduce evidence that the drugs recovered from the accused in the airport and that was sent to the chemist for analysis was the same drug exhibit that the accused was charged with. In the instant case, the customs officers had explained that the weight discrepancies were because of the use of uncalibrated weighing machine by the customs officers as compared to the weight obtained by the chemist, who analysed the seized drug using a calibrated weighing machine. As for the difference in the weights stated in the original charge and the weight of the drug exhibit as analysed by the chemist, the prosecution had explained that when the accused was initially brought before the magistrate the estimated weight of the drugs was 1,396g because the chemist report had yet to be issued. However, upon the issuance of the chemist report, which confirmed the weight of the drug exhibit to be 336g, the prosecution had amended the charge. Further, there was no break in the chain of evidence by the customs officers who handled the drug exhibit. Therefore, plain reliance on the discrepancies of the weight alone without more was misconceived. As such, the drug exhibit admitted in evidence in this instant case was the same as the drug seized by the customs officer at KKIA and there was no issue of doubt in the identity of the drug exhibit (see paras 68–69 & 74).

(2) In relation to the ingredient of possession, the prosecution had relied on the statutory presumption in s 37(d) of the Act to establish that the accused had the requisite knowledge of the existence and nature of the drug exhibit. Based on the evidence adduced by the prosecution in the present case it was apparent that there was no issue on the element of

possession in relation to 'custody' or 'control' of the rice cooker, which contained the drugs. Therefore, the presumption under s 37(d) of the Act applied against the accused and she would be deemed to have possession of the drug exhibit (see paras 76, 78 & 83).

(3) In the instant case, the accused transporting the drugs seized from Hong Kong to Kota Kinabalu, would fall under s 2 of the Act. In addition, under s 37(da) of the Act a person found in possession without lawful authority of 50g or more of methamphetamine would be presumed to be trafficking in the drug 'unless the contrary was proved'. The quantity in the instant case was very much more in excess of the minimum required to kick in the presumption of trafficking under s 37(da) of the Act. Under the new s 37A of the Act, the prosecution, apart from invoking the presumption of possession and knowledge under s 37(d) of the Act, could now invoke the presumption of possession of trafficking under s 37(da)(xvi) of the Act. Thus, apart from proving the element of trafficking under s 2 of the Act, the prosecution could in the alternative invoke the presumption of trafficking under s 37(da)(xvi) of the Act. In the circumstances, the prosecution had established the offence of trafficking against the accused (see paras 94–98 & 100).

(4) The accused person's defence failed to raise reasonable doubt on the prosecution's case. It was uncorroborated and highly improbable and the defence had also failed to rebut the statutory presumption of knowledge under s 37(d) of the Act. Thus, the accused was guilty of having in her possession 336g of methamphetamine and trafficking in that quantity of drugs (see paras 133–134).

[Bahasa Malaysia summary

Pada 17 Ogos 2014, tertuduh yang sedang transit di Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kota Kinabalu ('LTAKK') baru sahaja hendak menaiki penerbangan ke Kuala Lumpur, apabila dia ditahan oleh pegawai kastam yang bertugas di lapangan terbang. Pegawai kastam melihat sesuatu yang mencurigakan apabila kotak yang dibawa tertuduh diletakkan dalam mesin pengimbas kastam. Kandungan kotak dan periuk nasi yang berada dalam kotak tersebut kemudiannya diperiksa. Pegawai-pegawai jabatan kastam mendapati kuantiti besar bahan kristal dalam lima paket kertas karbon hitam yang tersembunyi di bahagian bawah periuk nasi. Kandungan paket-paket tersebut kemudiannya dianalisis oleh ahli kimia yang mengesahkan kandungan tersebut adalah 336g methamphetamine ('ekshibit dadah'). Perayu telah ditahan dan didakwa kerana mengedar 336g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Tertuduh berhujah bahawa perbezaan yang tidak dapat dijelaskan antara berat kasar ekshibit dadah yang dirampas oleh pegawai kastam dan ahli kimia adalah mencukupi untuk menimbulkan keraguan yang munasabah kepada kes pendakwaan. Seterusnya, tertuduh berhujah bahawa

terdapat percanggahan ketara antara berat dadah yang dinyatakan dalam pertuduhan asal dan berat dadah yang dianalisis oleh ahli kimia dan ini menimbulkan keraguan munasabah tentang identiti ekshibit dadah. Pihak pendakwaan menjelaskan bahawa apabila tertuduh pada mulanya dibawa di hadapan majistret, berat anggaran dadah tersebut adalah 1,396g dan laporan ahli kimia itu masih belum dikeluarkan. Walau bagaimanapun, selepas pengeluaran laporan ahli kimia yang mengesahkan berat ekshibit dadah adalah 336g, pihak pendakwaan telah meminda pertuduhan. Pada akhir kes pendakwaan, hakim perbicaraan mendapati pihak pendakwaan berjaya membuktikan kes prima facie dan memanggil tertuduh untuk membela diri. Tertuduh menafikan sebarang pengetahuan tentang kehadiran dadah di dalam kotak yang dibawanya. Premis pembelaan orang yang dituduh adalah bahawa dia diminta oleh Clitin, seorang sahabat dari Afrika, untuk membawa kotak ke Kuala Lumpur untuk diberikan kepada abangnya yang kononnya kotak tersebut mengandungi pakaian dan aksesori. Pendek kata, tertuduh mendakwa dia adalah pembawa tidak bersalah.

Diputuskan, menyabitkan tertuduh dengan kesalahan mengedar dan menjatuhkan hukuman mati ke atasnya:

(1) Setelah identiti ekshibit dadah dicabar oleh tertuduh, adalah menjadi beban pihak pendakwaan untuk mengemukakan keterangan bahawa dadah yang didapati daripada tertuduh di lapangan terbang dan yang dihantar kepada ahli kimia untuk dianalisis adalah ekshibit dadah yang sama di mana tertuduh didakwa. Dalam kes ini, pegawai-pegawai kastam telah menjelaskan bahawa percanggahan berat adalah kerana penggunaan mesin berat tidak ditentukur oleh pegawai kastam berbanding dengan berat yang diperolehi oleh ahli kimia, yang menganalisis dadah yang dirampas menggunakan mesin penimbang yang ditentukur. Berhubung perbezaan dalam berat yang dinyatakan dalam pertuduhan asal dan berat ekshibit seperti yang dianalisis oleh ahli kimia, pihak pendakwaan menjelaskan bahawa apabila tertuduh pada awalnya dibawa ke hadapan majistret, berat anggaran dadah adalah 1,396g kerana laporan kimia belum dikeluarkan. Walau bagaimanapun, selepas pengeluaran laporan ahli kimia yang mengesahkan berat ekshibit dadah menjadi 336g, pihak pendakwaan telah meminda pertuduhan. Selanjutnya, tidak terdapat pecahan dalam rantaian keterangan oleh pegawai-pegawai kastam yang mengendalikan ekshibit dadah. Oleh itu, pergantungan kosong pada percanggahan berat sahaja tanpa yang lain merupakan salah anggapan. Oleh itu, ekshibit dadah diterima sebagai keterangan dalam kes ini adalah sama seperti dadah yang dirampas oleh pegawai kastam di LTAKK dan tidak timbul isu keraguan dalam identiti ekshibit dadah (lihat perenggan 68–69 & 74).

(2) Berkenaan inti pati milikan, pihak pendakwaan bergantung kepada anggapan statutori dalam s 37(d) Akta untuk membuktikan bahawa

tertuduh mempunyai pengetahuan yang diperlukan mengenai kewujudan dan sifat ekshibit dadah. Berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan dalam kes ini adalah jelas bahawa tiada isu tentang elemen milikan berkaitan 'jagaan' atau 'kawalan' periuk nasi yang mengandungi dadah. Oleh itu, anggapan di bawah s 37(d) Akta digunakan terhadap tertuduh dan dia dianggap memiliki ekshibit dadah (lihat perenggan 76, 78 & 83).

(3) Dalam kes ini, tertuduh mengangkut dadah yang dirampas dari Hong Kong ke Kota Kinabalu, yang terangkum di bawah s 2 Akta. Di samping itu, di bawah s 37(da) Akta, seseorang yang didapati memiliki 50g methamphetamine atau lebih tanpa kebenaran yang sah akan dianggap mengedar dadah 'melainkan jika dibuktikan sebaliknya'. Kuantiti dalam kes ini adalah melebihi minima yang diperlukan untuk menolak anggapan pengedaran di bawah s 37(da) Akta. Di bawah s 37A baru Akta, pihak pendakwaan, selain daripada menggunakan anggapan milikan dan pengetahuan di bawah s 37(d) Akta, kini boleh menggunakan anggapan milikan untuk mengedar di bawah s 37(da)(xvi) Akta. Oleh itu, selain membuktikan elemen pengedaran di bawah s 2 Akta, pihak pendakwaan boleh secara alternatif menggunakan anggapan pengedaran di bawah s 37(da)(xvi) Akta. Dalam keadaan ini, pihak pendakwaan berjaya membuktikan kesalahan mengedar terhadap tertuduh (lihat perenggan 94–98 & 100).

(4) Pembelaan tertuduh gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Pembelaannya tidak disokong dan sangat tidak berkemungkinan dan pembelaan juga gagal mematahkan anggapan pengetahuan statutori di bawah s 37(d) Akta tersebut. Oleh itu, tertuduh bersalah kerana mempunyai dalam milikannya 336g methamphetamine dan mengedar dadah dalam kuantiti tersebut (lihat perenggan 133–134).]

Notes

For cases on exhibit in general, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 1854–1861.

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Abbas Shrazi Davoud v PP [2015] 6 MLJ 387, CA (refd)
Agus bin Agil v PP [2011] 4 MLJ 442; [2010] 9 CLJ 125,CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 6 AMR 189, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Khairuddin bin Hassan v PP [2010] 6 MLJ 145, FC (refd)

A *Koh Tiong Hock v PP* [2011] 4 MLJ 40; [2011] 2 CLJ 377, CA (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Nguyen Thi Thu lwn Pendakwa Raya [2015] MLJU 872, CA (refd)
B *Ong Ah Chuan v PP* [1981] 1 MLJ 64, PC
PP v Atisheshan Singaram [2010] 1 LNS 463, HC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)
PP v Lin Yu Choy [2011] 6 MLJ 61; [2010] 1 CLJ 94, CA (refd)
Yusri bin Pialmi v PP [2011] 4 MLJ 533, FC (refd)
C *Sarumathi Rengasamy v PP* (Criminal Appeal No P-05–248-10 of 2013) (unreported), HC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)
Zaifull bin Muhammad v PP [2013] 2 MLJ 348, FC (refd)
D

Legislation referred to

Criminal Procedure Code s 180, 180(3)
Dangerous Drug Act 1952 ss 2, 37(d), (da), (da)(xvi), 37A, 39B(1)(a), (2), Schedule
E

Gilbert Bulagang (Bulagang & Co) for the appellant.
Nazir Amir bin Johari (Deputy Public Prosecutor, Royal Malaysian Customs Department) for the respondent.

F **Nurchaya Arshad J:**

SALIENT FACTS

[1] On 17 August 2014, Lan Yi Ling ('the accused') was arrested at the
G International Arrival Hall of Terminal 1, Kota Kinabalu International Airport, after officers from the Customs Department found a large quantity of crystalline substance in five black carbon paper packets wrapped with a transparent cellophane tape concealed beneath the bottom part of the rice cooker she was carrying. After an investigation and analysis was undertaken on
H the contents of the said packages; the contents were confirmed to be methamphetamine weighing 336g.

[2] The following charge was preferred against the accused:

I That you, on the 17th day of August 2014, at about 6:30 pm at Terminal 1 Arrival Hall of the Kota Kinabalu International Airport in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 336 grams of Methamphetamine and that you have thereby committed an offence under Section 39 B (1)(a) of the Dangerous Drugs Act, 1952 (Act 234) punishable under Section 39B (2) of the same Act.

PROSECUTION EVIDENCE

[3] On 17 August 2014 Aisah bt Andi Bambang ('PW4'); a custom officer tasked with supervising and leading Team B consisting of 13 customs personnel; were on operational duty at the Passangers Examination Unit KKIA (T1).

[4] Among them were custom officer PIKK Paul Yong Siu Poh ('PW3') whose duty as a rover, and another was PIK Salasiah Beladan (PW2) who manages the scanner machine at the custom examination counters. The scanner machine comprises a part of the Customs Special Unit for Investigation/Examination of Passangers Unit which is located in the baggage delivery hall at the Kota Kinabalu International Airport.

[5] PW2 testified that on the 17 August 2014 at about 6pm she was involved in the arrest of a suspect ('the accused') in connection of an offence of drug trafficking at the Arrival Hall of Kota Kinabalu International Airport Terminal 1.

[6] She was between the hours of 1400 and 2200 on shift B duty in particular, maning the scanner machine at counter No 99 for security clearance at the examination unit counter under the chief supervision of Puan Aisyah Andi Bambang ('PW4').

[7] Counter No 99 is located between the baggage carousels where passengers collect their luggage, and the exit towards the arrival hall.

[8] A yellow line which runs the length of the customs counters marks the area delineated to the Royal Malaysian Customs and Excise Department, Malaysia. Counter No 99 is also adjacent to a broad utilised by passengers who have no taxable/dutiable goods to declare. At about 1800 hours Malaysian Airline Flight No MH385 from Hong Kong landed and its passengers by 1820 hours were already in line placing their baggage(s) for security clearance at the scanner machine No 99 when suddenly PW2 observed *a suspicious image on the screen monitor — shapes of rectangular greenish-black in the colour of non-organic matter displayed inside the rice cooker.* PW2 quickly decided to make further inspection of the said rice cooker which was packed inside a plastic bubble wrapped box ('the box') that just went under the scanner machine revealing a suspicious image.

[9] PW2 went straight to the end line of the scanner machine where a lady passanger accompanied by an unknown MAS officer was already standing on the opposite side, waiting to collect the rice cooker packed inside the said box on exit from the scanner machine.

[10] PW2 asked the lady, 'whose box is this?' and the lady answered 'this is my box' whereupon PW2 directed the lady to bring the box to the examination counter (refer exh P8).

[11] Meanwhile, the unknown MAS officer who was standing beside the accused informed PW2 that the lady was on transit to Kuala Lumpur via an Air Asia flight at 9.30pm.

[12] PW2 requested for the lady's passport ('P9') and both passport and the baggage tag ('P10(a)(i)') attached to the box bear the same name as Lan Yi Ling ('the accused').

[13] The rice cooker box ('P10(c)') was fully wrapped with a plastic 'bubble wrapper' ('P10(a)'). PW2 gave a knife to the accused and instructed the accused to cut open the plastic bubble wrapper.

[14] The unveiling of the 'bubble-wrapper' revealed an image of a rice cooker with the word PANASONIC printed boldly on the box. The box was securely sealed and having unsealed it the accused continued to remove the rice cooker ('P10(d)') from the said box.

[15] Having to secure the rice cooker, the accused proceeded to remove the lid off the rice cooker, after which only then PW2 intervened by removing a white plastic container (P10(d)(i), as well as a black coloured pot (P10(d)(ii)) from inside the rice cooker.

[16] PW2 sneaked a peek inside the rice cooker but found nothing of the said images as displayed earlier in the scanner monitor and furtively placed P1(d)(i)–(ii) back into the rice cooker and closed its lid back. PW2 immediately called and briefed another custom officer, Paul Yong ('PW3') about the matter at hand.

[17] Paul Yong (PW3) is a senior custom officer attached to KKIA Airport on duty as a rover whose job covers walking around inside the airport and identify passengers suspected to be carrying anything suspicious and to alert the staff on the arriving hall to do extra examination on the said passenger.

[18] PW3 confirmed PW2's testimony that around 6.30pm, he was asked by PW2 to do a second scanning on the said rice cooker to confirm suspicious observation made by PW2 earlier. He was at that material time standing not too far away from PW2.

[19] PW3 took action by once again placing the rice cooker without its box as well as removing all the accessories found in the rice cooker (the rice scoop, the manual instruction booklet and the cable) to do a second scanning. Again the scanner shows the same footage as observed in the beginning; shapes of rectangular greenish-black in the colour of non-organic object displayed inside the rice cooker. PW3 clarified that ordinarily, looking inside the said rice cooker through a naked eye one could not see the said images.

[20] With the accessories and the rice cooker repacked into the box (P10(c)) PW3 instructed the accused to carry along her seized belongings including her yellow slingbag (P11) to follow him and PW2 with the other customs personnel of B team ie Chief Jim Dangin and Masnih Parudin to the 'Bilik Operasi Custom' (see exh P8 'the sketch plan').

[21] Along the way, PW3 striked a conversation with the accused in Mandarin language. The accused mentioned that she came from China and was going to Kuala Lumpur on holiday. She also said that she had intended the said rice cooker to be given to somebody as a gift but did not volunteer information as to whom and where that someone is.

[22] Both PW2 and PW3 observed the accused reacted normally to her belongings being scanned and examined eventhough PW3 mentioned that the accused kept questioning him in Mandarin like 'what happened?'.

[23] On the way to the 'Bilik Operasi', PW3 sought assistance from his supervisor PW4 who was at that material time standing on the green lane (see exh P8 highlighted as green dot) and asked her to join them to the 'Bilik Operasi'.

[24] PW4 gave evidence and corroborated PW2 and PW3(s) evidence in material particular.

[25] PW4 was as mentioned earlier by PW3 was standing in the greenlane area. As a supervisior of Team B her duty among others was to supervise those personnel under her are in their respective working positioned and also to observe the incoming passangers from Hong Kong via MH385 who were walking towards the baggage conveyour belt 'A' to pick their respective baggages.

[26] At that material time she too noticed a lady accompanied by a Malaysian Airline officer walking towards No 99 scanner machine counter. She was carrying a box and sling a bag. She acknowledged the man who accompanied the lady is a MAS officer by virue of his uniform and the security pass hanged against his shirt.

[27] From where she was standing she could clearly see the going on at No 99 scanner machine, examination counter and confirmed that PIK Salasiah Beladan (PW2) was stationed on duty at No 99.

[28] She only turned her attention towards other passangers for a moment and on turning back to No 99 counter she saw PW2 was already calling PW3 who was at that moment standing in between the greenlane area and No 99. She also testified that she saw from the near distance PW3 was communicating with the lady she mentioned earlier (accused) and subsequently saw the lady carrying a rice cooker from the examination counter without its box to No 99 and had it rescanned. That was the prelude as what followed inside the 'Bilik Operasi'.

INVESTIGATION CONDUCTED BY THE NARCOTICS DIVISION OF THE ROYAL CUSTOMS AND EXCISE DEPARTMENT AT THE 'BILIK OPERASI KASTAM'

[29] Inside the 'Bilik Operasi' PW3 briefed PW4 about the matters at hand ie that the lady as mentioned earlier was carrying item of suspicious nature inside an electrical rice cooker which was packed inside exh P10(c). Thereafter PW3 handed over both the accused and her belongings to PW4. Following that PW4 directed PW2 to inspect the slingbag and on examination by PW2 nothing incriminating was found. Further action was taken by PW4 by informing KKIA Narcotics Division and the Head of the KKIA Branch of the Royal Customs Department in relation to the suspected incriminating evidence displayed inside the rice cooker. The instruction by the latter was to wait for the KKIA Narcotics Divisional team to arrive and meanwhile PW4 directed PW2 and PW3 to place the lady and the seized exhibit under their supervision until the arrival of the narcotics team which was about 7.25pm. They were PIKT Richard Martin, PIK Jason, PIK Selestine and PIK Connie.

[30] In her capacity as leader of Team B she gave direction to PIKT Richard Martin to make further and thorough inspection as well as examination of the rice cooker which the said suspicious images displayed in the scanning screen monitor could not be seen by the naked eyes inside the rice cooker (P10(d)).

[31] PIKT Richard Martin and his team began to unscrew the nuts that were drilled at the bottom of the rice cooker and once unscrewed they found packed inside, surrounding the bottom hollow of the rice cooker filled with five black packages.

STEPS TAKEN AFTER THE DISCOVERY OF THE FIVE BLACK CARBON PAPER PACKET INDIVIDUALLY WRAPPED WITH TRANSPARENT CELLOPHANE TAPE ('THE FIVE PACKAGES') CONCEALED INSIDE THE BOTTOM PART OF THE RICE COOKER CARRIED BY THE ACCUSED

[32] PIKT Richard Martin on the instruction of PW4 took sample from one of the five packages (labeled and marked as A(2)(d)/P5(3)(i)).

[33] A tester kit was used to take the sample. This sample was then placed inside a container filled with liquid substance and shaken to mix them together. Finally, the liquid mixture was poured onto the tester kit which revealed stripe of colour to confirm methamphetamine a dangerous drug.

[34] PW4 read out the caution statement under s 37 of the DDA 1952 and explained what it meant to the accused. This was translated into the Chinese (Mandarin) language by PW3 which PW3 did and the accused was observed to be saddened and cried.

[35] A physical examination was done on her by PIK Connie witnessed by PIK Salasiah Beladan but proved to be negative however PIK Connie found four pieces of USD100 notes and six pieces of 1 Yuan in the accused's trouser pocket.

[36] PW4 together with two other officers walked to the Balai Polis LTAKK (KKIA) to lodge a police report in relation with the arrest of the accused and meanwhile PW4 directed the narcotics team and PW2 to stand guard at the accused and her seized items.

[37] At about 2100 hours PW4 went back to the bilik operasi and directed the narcotics team to collect the entire seized exhibit and handcuffed the accused and escorted her to Wisma Custom Jesselton Point for further action.

IDENTIFICATION AND MARKING OF THE SEIZED ITEMS

[38] At Wisma Custom Jesselton Point PW4 approached Assistant Director of Custom Tuan Fardly Harris who is the investigation officer on duty.

[39] Fardly Harris bin Salleh (37) ('PW5'), the investigation officer in this instant case gave oral testimony in court that on the 17 August 2014 he met with PW4 and PIKT (N) Richard Martin who led the narcotics team in connection with drug trafficking offence in the 'Bilik Operasi' at Wisma Kastam, Jalan Haji Saman, Kota Kinabalu, Sabah bringing along with them the accused person together with the seized exhibits belonging to the accused.

[40] Having being fully brief the matter at hand by both PW4 and PIKT (N) Richard Martin, PW5 directed PW4 to lead the narcotics parties ie PIK Jason, PIK Selestine, PIK Connie and PIK Joy to begin preparing the search list in relation to the exhibits seized; meanwhile PW5 went back to his office to prepare the requisite forms in relation to the matter at hand.

[41] PW4 then individually labelled the five packages containing the impugned drugs as A2(d), A2(e), A2(f), A2(g) and A2(h) (tendered as court exh P5(3)(i)–(v) also placing on them her signature and the date. A photograph was taken of these five packages (exh P5(3)(i)–(v) and the rest of the items seized. All of the items seized were individually labelled or tagged by PW4 in the presence of the accused. Upon completion of the labeling of the seized exhibit and photography session, PW4 did a handing over of the seized exhibits to PW5 the investigation officer on duty.

[42] All these procedures were completed by midnight and the official handing over of the requisite forms and the exhibits seized were only done at about 12.30am between PW4 and PW5.

[43] PW5 placed the box supplied by JKDM containing the subject drug (P5) and the Panasonic box containing the electrical rice cooker, inside a steel cabinet under lock and key in his office, which he alone had access to.

[44] PW5 testified that subsequent to the placement of the boxes inside the said locked steel cabinet the next time he took exh P5 and its contents was on the 19 August 2014 at about 10.30pm until 12pm for press release. Throughout the press release, PW5 was assisted by PIKT (N) Richard Martin, PIK Joy Rommy and PIK Jason from the narcotics team to supervise exh P5 and its contents to ensure that the subject drug was under their control and custody.

[45] Immediately after the press release was over the box with its contents was brought back to PW5's office in preparation for the said exhibits to be sent to the Chemist Department for analysis. The subject drugs were separately placed inside a transparent plastic bag and all five transparent plastic, bags was again placed inside a box which PW5 had labeled 'E' against the front and back of the box (P5). The box was then tied and sealed with the security label of JKDM (exh P5(4)).

[46] Accompanied by PIK Richard Martin, PIK Joy Rommy and PIK Jason PW5 brought exh P5 to the Jabatan Kimia Malaysia, Sabah. PW5 met with PW1, the chemist officer and along with exh P5 he also handed to him the KIMIA 14 (exh P4) and received from him the acknowledgment official receipt (exh P4(a)).

THE ANALYSIS OF THE DRUGS IE THE CRYSTALLINE SUBSTANCE BY THE CHEMIST (PW1)

[47] Biling ak Peter Raig (40) ('PW1') (the chemist) brought and produced his witness statement in court which was marked as exh P3 pp 1–6 affixed with his signature. PW1 disclosed his profession, academic qualification, courses and training, examination, analysis and finding.

[48] He also gave his oral testimony which are in pp 3–15 of the notes of proceeding with the additional tendering of the requisite exhibits which among others, in particular the box labeled 'E' (P5), P5(3)(iv), P6, P7, P8, P10(a)–(d), P11 and those exhibits including in the Senarai Exhibit No Kes BKI-45A-1/1 Tahun 2015 tendered by PW1. Exhibit P5 he described had the Jabatan Kimia Malaysia security labeled still intact and in good condition with his signatures affixed, with a serial No 2207070 until 2207072 (P5(1)(a)–(c)) sealed on both the left and right upper opening of P5.

THE WEIGHT AND NATURE OF THE DRUG

[49] On the 19 August 2014 PW1 received a box labeled 'E' (P5) sealed with 'Kastam dan Eksais di Raja Malaysia' daripada I/O Fardy Harris bin Salleh (PW5) together with *Surat Permohonan Serahan Exhibit Bagi Tujuan Analisa Kimia Dadah* dated the same (Form Kimia 14 (P4A)) PW1 opened exh P5: containing five separate packets of black carbon paper wrapped with a clear cellophane tape and suspected to contain dangerous drug ie methamphetamine. Individually the said packets were labeled with A2(d), A2(e), A2(f), A2(g) and A2(h) correspondingly the gross weight of each packet was labeled as 444g, 212g, 243g, 225g and 272g respectively by the custom officer, PW4 (Puan Aisah bt Andi Bambang) (see P13(1)–(3)).

[50] In addition, another labeled A2(d)(i) was placed over a hole made by one of the custom officer on the package labeled A2(d) to take sample using a test kit supplied by the Jabatan Kastam to confirm the said drugs.

[51] PW1 began his analysis by weighing A2(d), A2(e), A2(f), A2(g) and A2(h) including its contents ie the crystalline substances to get the gross weight by using a digital calibrated machine. Followed by removing all its contents and proceeded to weigh the empty plastic bags.

[52] The total net weight of the crystalline substances was determined by the difference of the gross weight and the weight of the empty plastic bag which amount as 1186.5g of the total net weight of the crystalline substance and of the amount, it contained 336g of methamphetamine.

[53] These crystalline substances were homogenised and chemical analyses were done thereafter.

[54] Firstly, the colour tests to determine the presence of drugs by using the Marquis Test and Simon Test. The former will display orange to brown colour to show the crystalline substance may contain methamphetamine. Whereas the latter will display blue colour to show the crystalline substance may contain methamphetamine.

[55] Secondly, the Gas Chromatography-Mass Spectrometer (GCMS Test) to identify the type of drugs found in the crystalline substance and from the said test it was confirmed to be methamphetamine.

[56] Finally, the Quantitify Test using the GC-FID to determine the quantity of methamphetamine found in the crystalline substance. For this test PW1 has taken 'sejumlah 7 bilangan sampel perwakilan' from the said homogenised crystalline substances. The result of these analyses confirmed the weight of methamphetamine to be 336g (please refer to witnesses statement (P3) pp 3–6).

[57] Having completed analysing the subject drug whereupon, inter alia, the homogenisation of the crystalline substances A2(d) until A2(h) which balance was placed inside a transparent plastic packet supplied by the Jabatan Kimia Malaysia with Nombor Makmal 14-FR-S-04177. This was then placed back into P5 by PW1 sealed with the Chemist Department security seal. Thereupon PW1 handed it over to PW5 together with the chemist report ('P7').

[58] PW5 testified in court and confirmed that on the 19 November 2014 he had earlier gone to the Jabatan Kimia Malaysia to collect the box with its content from PW1 and with it the chemist report (exh P7). The box exh P5 was intact and sealed with the security labeled of the Jabatan Kimia Malaysia. PW5 then gone back to his office to collect the other box which contain the electrical rice cooker and brought both boxes to be stored at the Narcotics Division, Enforcement Store at Jalan Seppangar.

[59] PIKT (P) Ag Rahim Ag Kassim was the storekeeper who received the two boxes and the handing over was documented and exhibited as P20. By which time another custom officer Paul Elson Siowou Jr had taken over the investigation paper and the person who was then responsible to take the two boxes of exhibit to be brought to the court to be produced as court's exhibit.

[60] The foregoing were the factual matrix of the prosecution case; the evidence of facts adduced in court by the prosecution's witnesses which I have

summarised and made enteries into chronological order of only the admissible and relevant evidence.

BURDEN ON THE PROSECUTION

[61] The burden on the prosecution at the close of the prosecution case is to make out a prima facie case as is encapsulated in s 180 of the Criminal Procedure Code.

THE INGREDIENTS OF THE CHARGE AGAINST THE ACCUSED

[62] In order to make out a prima facie case against the accused, the prosecution is bound to prove the following elements or ingredients of the charge preferred against the accused, namely:

(a) that the drugs are 'dangerous drugs' as defined in the Schedule to the Dangerous Drug Act 1952 (the subject matter concerned in the present case is 336g of methamphetamine);

(b) that the accused had possession and knowledge in the criminal sense of the subject matter; and

(c) the accused on 17 August 2014 at about 6.30pm at the International Arrival Hall, Terminal 1 of Kota Kinabalu International Airport, in the district of Kota Kinabalu, in the State of Sabah did traffic in the said dangerous drugs to wit, methamphetamine weighing 336g.

[63] Learned counsel for the accused only raised contention on the identity of the subject drug exh P5(3)(i)–(v), there were:

> Firstly, there are differences in the weight of the drug exhibit P5 (3) (i-v) as weighed by PW4 ('the complainant') compared to the gross weight recorded by the chemist (PW1) of which the former, the weight recorded being 1398.17g and the latter, 1396g resulting in the difference of 2.7g.
>
> Secondly, the original charge against the accused is trafficking dangerous drug to wit, Methamphetamine estimated weight of 1,396g. However, PW1, the Chemist found that the crystalline substance that was delivered to him [A2(d-h)] after analysis only contained 336g of Methamphetamine. Thus, learned counsel contended that the discrepancy has created doubt as to the identity of the drugs exhibit P5 (3) (i-v).

[64] Learned counsel cited the cases of *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533; *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145; and *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1 *in toto* to support his contention.

[65] Learned DPP applied the Federal Court case in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 to counter learned counsel's assertion and distinguished the cited cases above.

[66] In this case, His Lordship Raus Sharif PCA ruled that:

> ... In this regard it is pertinent to note that the identity of the drugs exhibits was never an issue before the High Court as well as the Court of Appeal. There was no challenge as to the identity of the drug exhibits by the defence.
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> ...
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> Thus the only issue left is whether the unexplained difference between the gross weights of the drug exhibits as found by PW6 and that of PW3 is sufficient to create a reasonable doubt to the prosecution case. On the facts and circumstances of this case, we answer this issue raised in the negative. *In this case PW4 and PW6 had clearly identified the drug exhibits that were produced before the Hich Court. Both PW4 as well as PW6 had identified the marking that they had made on the exhibits including the date and the signatures they placed on the five slabs of the drugs exhibits. PW3 too had identified the markings as found on the exhibits when she received it from PW6.*
>
> Having regard to the evidence of PW4, PW6 and PW3 learned counsel's contention that the drug exhibits produced before the High court might not be the same as the one seized by PW4 from the appellant is, in our view, misconceived. On the evidence adduced, we are in no doubt that the drug exhibits that were produced before the High Court upon which the appellant was charged. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drugs exhibits.
>
> It is not in dispute in this case that PW6 found the gross weight of the drug exhibits to be 4860g while PW3 found it to be 4688.15g. Thus, there was a difference of 171.45g.
>
> An explanation by the prosecution wouldhave been desirable, but on the facts and circumstances of this case we have no doubt that the drug exhibits seized from the Appellant and as examined by the chemist were the same drug exhibits that the Appellant was charged with ...

His Lordship further added:

> Similarity on the facts and circumstances of the present case, we are of the view that the difference in weight of the drug exhibits by itself as found by the PW6 and the PW3 is not sufficient to create a reasonable doubt to the prosecution's case.
>
> *We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnessses in particular PW4, PW6 and PW3.* In fact, the identity of the drug exhibits was never challenged before the High Court. It had never been raised as an issue before the High Court as well as the Court of Appeal.

[67] The Federal Court case of *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325 where His Lordship Richard Malanjum CJSS elaborated on the issue in contention as follows: A

> In relation to the differences in the weight given, the respective relevant witnesses gave their versions of the event including the reasons for weighing the drug exhibit. SP9 made it clear that a bag together with the drug exhibit were given to him by SP7 for fingerprint tracing. Upon receipt he used an uncalibrated weighing machine to weigh the drug exhibit. He took the weight in relation to tracing the fingerprint. He learnt from a course he attended that the weight of a thing could affect the result in determining fingerprint on it. Thus, the weight he obtained was immaterial in determining the offence the appellant would finally be charged with it. Hence, there was actually no necessity for him to explain. Nevertheless his explanation on the weight issue could be inferred from the fact that he used uncalibrated weighing machine. Further, there was no challenge that he received the drug exhibit from SP7. B C D
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> As for SP7 he said that he received the drug exhibit from SP1. Again there was no serious challenge on the issue. SP7 weighed them merely to counterback on the weight given by SP1. He was not sure whether the weighing machine he used was calibrated. Being the Investigating Officer it would be necessary for SP7 to know the estimated weight of the drug seized by SP1 as the weight would assist him to determine the nature of the offence committed and the course to take in his investigation of the case. E
>
> The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial. Thus, there was no necessity for him to explain on the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncaliberated weighing machine easily explained for the weight discrepancy. F
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> There was no dispute that SP3, the chemist who analysed the seized drug used calibrated weighing machine to determine its weight. G
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> Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. And although their explanations might not have been necessary as stated earlier, nevertheless explanation was given or could easily be inferred from their testimonies unlike in Zaiful case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact the presentcase this weight issue was also considered by the learned judge and he ruled that there was no break in the chain of evidence thus rendering the weight immaterial in coming to his decision. H I
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> We are therefore of the view that reliance on Zaiful case without more by learned counsel for the Appellant was misconceived. Accordingly, we find that the drug exhibit admitted in evidence in ths case was the same as those seized by SP1 at KLIA. Indeed SP1 who marked the drug exhibit before passing it to SP7 testified and

confirmed that it was the same drug exhibit that he seized in KLIA. This unchallenged confirmation by SP1 should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit. Indeed in our view this one of the facts and events that formed the foundation not only for the admission in evidence of the drug exhibit but also its reliability and trustworthiness as a piece of evidence.

[68] Likewise, in this instant case the explanation by PW4 (refer: p 59 of the NOP) the use of uncalibrated weighing machine easily explained for the weight discrepancies. Similarly, there was also no dispute that PW1, the chemist who analysed the seized drug used caliberated weighing machine to determine its weight. Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by PIKT Richard Martin as the officer who did the weighing on the instruction of PW4 was due to the use of uncalibrated weighing machine as compared to the weight obtained by PW1 who used a calibrated weighing machine. I am also mindful that learned counsel did not cross-examination on PW4 at all when PW4 testified in court. Further, there was no break in the chain of evidence especially by PW4 and PW5, who handled the drug exhibits, whereby they identified all the drug exhibits and testified that they identified the markings they made on the exhibits earlier thus rendering the weight issue immaterial. The positive identification of the four packets containing dangerous drugs (P5(3)(i); A2(d)), (P5(3)(ii); A2(e)), (P5(3)(iii); A2(f)), (P5(3)(iv); A2(g)) and (P5(3)(v); A2(h)) was never challenged by learned counsel for the accused.

[69] Therefore, plain reliance on the discrepancies of the weight alone without more by learned counsel was misconceived. Accordingly, I find that the drug exhibit admitted in evidence in this instant case was the same as those seize by PW4 at KKIA, Kota Kinabalu. Indeed PW1 who instructed and supervised PIK Selestine in the marking of the drug before passing it to PW5 testified and confirmed that it was the same drug exhibit that she seized in KKIA. This unchallenged confirmation by PW4 should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit and should not cast reasonable doubt over the prosecution's case, granted that all other ingredients of the offence had been successfully proved.

[70] Another issue rose, pertaining to doubt arising in the material discrepancy between the weights stated in the original charge before the magistrate and the weight of the methamphetamine as analysed by PW1. Learned counsel asserted that if it is left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In a drug related cases generally the prosecution before the expiration of the period of remand granted by the court a decision is to be made against any suspect either to file in a tentative charge or to release the suspect. Thus, the learned DPP submitted that in this instant

case, the accused was initially brought before a magistrate on a charge based on the gross weight of all five packets suspected to contain dangerous drugs which totalled to 1,396g as weight by the custom officer. The reason being at that material time the chemist report was yet to be issued. Upon the issuance of the same only then the prosecution amended the charge accordingly ie according to the actual weight of the dangerous drugs as analysed by the chemist (PW1). This is a matter of policy practices by the Attorney General's Chamber involving dangerous drugs. It is to be noted that there is no issue of doubt arising to the identity of the drug exhibits in consequence.

[71] It is therefore necessary in the instant case to consider the issue of the identity of the subject drug, the 336g of methamphetamine, so as to ascertain whether the drugs tendered in court and comprising the subject matter of the charge are in fact, the same drugs that were seize from the accused and subsequently tested by the chemist.

[72] The burden of ensuring that the identity of the drugs is not put in issues lies on the prosecution. This burden is discharged by the prosecution calling all the relevant witnesses to show that there has been no 'break in the chain of evidence' relating to the custody of the subject drugs so as not to rise to doubts or discrepancies to the identities of the drug exhibits. However, one must also be mindful of these two respectives cases of *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 and *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 6 AMR 189. The former case law, where His Lordship, Suffian LP has made it clear that, the law does not require that each and every officer who had handled the exhibits to be called. The purpose of establishing this complete chain of custody is to ensure that the drug recovered from the accused was the same as that tested by the chemist. It depends on the facts and circumstances of each case.

[73] The latter case law, proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap' does not necessarily mean that the fact is not proved. If for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that the exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

CHAIN OF EVIDENCE

[74] Clearly, based on the testimony of all the prosecution witnesses as outlined in the preceding paragraphs titled under the prosceution evidence, it

is left with no doubt that the chain of evidence of the drugs found is intact up to the stage when the said drugs were tendered to this court as case exhibits. That is to say that from the moment the substance was found until the stage that all the exhibits were tendered as evidence in court, there was no break in the chain of evidence of handling of exhibits. The exhibits, especially the said drugs, were never left without any supervision or control by and authorised officers from the respective Royal Malaysian Customs Department or the Chemist Department of Malaysia at any material time. There is also no doubt as to the identity of the said five packets as the packets that were adduced in court as exhibits by PW1 are the same as the ones that were marked and handled by both PW4 and PW5, as evidence in their positive identification of both exhibits when shown to them during their testimony.

[75] Finally, likewise I find as the prosecution had submitted that there was no evidence to show that the testimony of PW1 was inherently incredible. This court is satisfied that PW1 is a qualified government chemist having reference to his evidence exh P3. P3 explained in great detailed about his academic, professional background, relevant courses that he had attended pertaining to analysis of dangerous drugs and the analysis in this instant case that he carried out. I am also mindful that there was no other expert evidence that was called to testify on the same drugs exhibit to prove otherwise. Rightly so, this court is entitled to accept the opinion of PW1 on its face value.

POSSESSION

[76] In relation to the ingredient of 'possession' I rely upon these passage which I have in my earlier cases often quoted which I have extracted from numerous earlier cases; though not exactly in the same manner but the presence of the material substance were of the same. 'Possession' for the purpose of criminal law involves possession itself — which some authorities term 'custody' or 'control' — AND knowledge of the nature of thing possessed. As to possession itself Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, cited the following definition in *Stephen's Digest* (9th Ed, p 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to intend to do in case of need.

[77] Possession comprises both a physical and mental element. The former element is demonstrated by exclusive dominion and control over the subject property, such that the person in possession is able, solely to do as he pleases/wishes with that property (Sharma J in *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120). The mental element or 'mens rea' is denoted by

the conscious knowledge of the existence and nature of the subject property. If both these constituent elements can be established from the surrounding facts, then it can be said that 'possession' has been established. Direct evidence of each of these elements is the best manner of proof. However, the element of conscious knowledge and existence of the subject property is often not easily established by direct evidence alone, and in matters falling within the Dangerous Drugs Act 1952, the law supports the determination of this issue by allowing for reliance in the form of a rebuttable presumption in s 37(d) of the Act. It provides:

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug ...

[78] In the instant case, the prosecution submitted that it was relying on the statutory presumption in s 37(d) of the Act to establish that the accused had the requisite knowledge of the existence and nature of the 1,396g of methamphetamine. The question that therefore arises for consideration is whether the accused had physical custody and control of the subject drugs.

[79] On the basis of the evidence of PW2 it is apparent that the accused was caught carrying exh P10(c) and subsequently placed P10(c) in the Customs scanning machine as shown in the CCTV. The luggage tag fixed on exh P10(a) that was used to wrapped P10(c) bears the accused's name.

[80] After P10(c) was scanned, PW2 who saw the scanned image of P10(c) which looked suspicious asked the accused to open up the exhibit, to which she heeded to the instruction. Learned DPP submitted that at this juncture, if P10(c) does not belong to the accused to begin with (in the sense that was not her box that she intends to carry), she ought to have said so at that very instance but did not do so.

[81] Another telling point that brought to notice is that the accused only brought along P10(c) with her all the way from Hong Kong an electrical rice cooker. She did not bring any luggage with her except for her handbag exh P11.

[82] The accused apart from the MAS officer who's tasked was to assist transit passenger to their connection flight, she was all alone in her journey to Malaysia.

[83] I am mindful of learned defence counsel, inescapable omission to cross-examination prosecution witnesses on these matters making it so apparent that there is no issue on the element of 'possession' in relation to

'custody' or 'control' of the rice cooker (P10(c)) which contained the said drugs. Therefore the presumption under s 37(d) of the DDA applies against the accused in which if any person who is found to have in her custody or under her control anything whatsoever containing any dangerous drug shall be deemed to have in possession of such drug, and shall be deemed to have known the nature of the drug in the instant case methamphetamine. The accused is presumed to have possession and knowledge of the drugs found inside the said box (s 37(d)). The accused now has the burden to rebut this presumption on a balance of probabilities (*Public Prosecutor v Lin Yu Choy* [2011] 6 MLJ 61 at p 67; [2010] 1 CLJ 94 at p 101).

TRAFFICKING

[84] There is only one offence of trafficking under the Act (*Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604 at pp 611–612; [2009] 3 CLJ 430 at p 458).

[85] However, there are several acts that may constitute the offence of trafficking.

[86] Lord Diplock in the case of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 says that the natural meaning of the verb 'to traffic' in the context of trafficking in goods involves dealings between two parties at least.

[87] The Federal court acknowledges that the prosecution may bring its case under any of the acts that constitute 'trafficking' as per s 2 of the DDA.

[88] 'Trafficking' in line with s 2 of the DDA to include 'the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing *any dangerous drugs* otherwise than under the authority of this Act or the regulations made under the Act'.

[89] It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. All combined to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing something to promote the distribution of the drug to another (*Ong Ah Chuan*).

[90] *It is trite law that mere keeping, concealing or carrying of the* drug *is not sufficient to constitute trafficking. Requires proof of such purpose of which an act is done is a necessary ingredient of trafficking.*

[91] Thus, the action of the accused can be inferred to *proof the purpose* of trafficking (*Agus bin Agil v Public Prosecutor* [2011] 4 MLJ 442 at p 449; [2010] 9 CLJ 125 at p 133). For example: in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely needed for his own consumption — the inference that he was transporting them for the purpose of trafficking in them would in the absence of any plausible explanation by him, be irresistible — Even if there were no statutory presumption such as is contained in s 15 of the Drugs Act (Singapore Ong Ah Chuan).

[92] Some determination of relevant facts to apply s 2 of the DDA 1952:

> In the manner the drug was being carried, ie carefully concealed in the shoes of the sandals to avoid detection and taking into the total amount of the drug involved, as a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them and requires the said person to give more convincing evidence needed to rebut it (*Abbas Shrazi Davoud v Public Prosecutor* [2015] 6 MLJ 387 decided by the COA 16 September 2015). Finally, whether the purpose of the accused transporting the drugs that is for distribution was achieved or not is irrelevant to his guilt under this act. The Court of Appeal in the case of *Koh Tiong Hock v Public Prosecutor* [2011] 4 MLJ 40 at p 50; [2011] 2 CLJ 377 at p 390, the judgment is as follows:
>
> > Be that as it may, whether the prescribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' under s 2 clearly puts distribution abroad within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad. As submitted by the learned DPP the intention of the DDA is to encompass both drugs brought into and out of the country. The reference to the purpose for which drug is being transported was made by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1991] 1 MLJ 64 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. As stated in the Singapore case *Lau Chi Sing v Public Prosecutor* [1989] 1 MLJ 5 the offence is completed once there is an act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[93] I am in the instant case making a positive finding of fact that the accused was trafficking 336g of methamphetamine as defined under s 2 of the

DDA 1952, on the 17 August 2014 when she was arrested at the airport in Kota Kinabalu. In arriving at this finding, I am relying on the same factual analysis to which I have based my finding to establish that the accused was the person who was carrying the dangerous drugs in exh P10(c) from Hong Kong to Kota Kinabalu, Sabah, Malaysia via Malaysia Airlines System flight No MH385 and that the accused had the knowledge that exh P10(c) contained the dangerous drugs. The facts to which I have enumerated in the above passages established that the accused was not merely in passive possession or merely holding exh P10(c). The accused was carrying exh P10(c) ie moving exh P10(c) from Hong Kong to Kota Kinabalu, Sabah via air travel. This act of the accused amounts to trafficking as defined by s 2 of the DDA 1952 (see *Public Prosecutor v Atisheshan Singaram* [2010] 1 LNS 463).

[94] In the instant case, the accused transporting the said drugs from Hong Kong to Kota Kinabalu, falls under s 2 of the DDA even if there were no statutory presumption as is contained under s 37(da) of the Act. If unrebutted or unexplained the evidence is strong

enough to warrant the accused conviction. In the face of cogent evidence from the prosecution there is no reasonable doubt that the accused did carry the dangerous drugs within the definition of 'trafficking' under s 2 of the DDA.

[95] The law also make supposition that a person found in possession without lawful authority of 50g or more of methamphetamine is presumed to be trafficking in the drug 'unless the contrary is proved' (s 37(da)(xvi) of the DDA).

[96] The quantity in the instant case is very much more in excess of the minimum required to kick in the presumption of trafficking under s 37(da).

[97] The new s 37A which came into force on 15 February 2014 designed to obviate the dilemma of choice faced by the prosecution as stems from the decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC). It provides as follows:

> 37A Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[98] Therefore, the prosecution, apart from invoking presumption of possession and knowledge under s 37(d) of the DDA 1952, can now invoke the presumption of possession of trafficking under s 37(da)(xvi) of the same Act.

[99] In the instant case, the net weight of methamphetamine found in exh

P10(c) that was carried by the accused is 366g, which is far excessive than the threshold set which is 50g.

[100] Therefore, apart from proving the element of trafficking under s 2 of the DDA which has been argued earlier, the prosecution can in the alternative invoke the presumption of trafficking under s 37(da)(xvi) of the DDA, possession having been established in the preceding paragraphs.

DECISION OF THE COURT AT THE CLOSE OF THE PROSECUTION CASE

[101] It is my view that the evidence of the prosecution witnesses as a whole was sufficient to establish a prima facie against the accused based on the evidence adduced by the five prosecution witnesses, having considered the submission of learned counsel for the accused and the learned DPP pursuant to s 180(3) of the Criminal Procedure Code ('the CPC') for the offence of trafficking in the methamphetamine as per charge against her.

[102] I called upon the accused to enter her defence to the trafficking charge preferred against her.

[103] She chose to give sworn evidence and the defence only called on her. The defence did not call any other witnesses to corroborate or support the accused's claim. Her story was essentially that she was an 'innocent carrier'.

DEFENCE EVIDENCE

[104] The defence's version is as follows.

[105] DW1 is married with one daughter. Her husband is presently in China and did not know of her journey to Malaysia.

[106] DW1 ('the accused') on the 17 August 2014 at about 6.30pm via MH385 had landed at KKIA, T1 on transit to Kuala Lumpur via Air Asia Airline, KKIA T2 at about 9.30pm.

[107] She mentioned in her testimony that she was unaware that she had to stop at KKIA and requested the flight stewardesses to assist her regarding the transit procedure. An officer from the Malaysian Airline System came and escorted her the way to Terminal 1. She picked up her box (P10(c)) at the carousel and proceeded to the scanning counter for security clearance.

[108] DW1 was arrested because the Custom officers who were on duty at the airport said that she brought illegal things.

[109] DW1 brought a box (P10(c)) to Kota Kinabalu because her friend named Clitin an African man whom she befriended on a website called 'dateinasia.com' asked her to do so.

[110] Clitin on the 16 August 2014 at about 5.25pm asked her to take the box from his friend at China Hotel in Guangzhou. According to Clitin, the said box contains clothes and women's accessories.

[111] Clitin asked DW1 to give the said box to his elder brother who is staying in Kuala Lumpur without furnishing her the elder brother's contact number or address.

[112] When she met Clintin's friend at China Hotel in Guangzhou, the friend handed her over the box and told her to buy a reload card and gave her instruction to call him upon reaching Kuala Lumpur.

[113] DW1 knew Clitin for about three months ie since May 2014 and agreed to bring the box (P10(c)) to Kuala Lumpur because she would like to help as long as it is not illegal. In addition Clitin also promised to give her RMB5000. However she did *receive* from Clitin's friend the sum of USD400 and RMB300 (see p 106, para 2144).

[114] DW1 met Clitin's friend for the very first time at China Hotel though she had Clitin's friend phone number but still had no idea of the latter's name.On the other hand, she had never met Clitin in person except through the internet via an application called 'QQ' apparently a dateline services, though she got her his telephone contact.

[115] DW1 said, Clitin initialy wanted to ask another person named Tao Wan Wan to bring the bag to Kuala Lumpur but suddenly Clitin decided and asked her instead.

[116] At the airport in Hong Kong, Tao Wan Wan assisted her in checking the box as 'check-in luggage'. She did not know Tao Wan Wan personally but Clitin gave Tao Wan Wan telephone number to her. DW1 was in fact ignorant of the fact that she was given a first class flight seat and was thought that she was flying direct to Kuala Lumpur and that was then she asked for the flight stewardess's assistance.

[117] At the custom security clearance counter on reaching Kota Kinabalu, she said her mind went blank and felt she was dreaming when the custom

officer by the name of Mr Yong ('PW3') told her in Mandarin that they found drugs inside the bottom of a rice cooker that was inside the box she was carrying.

[118] In the instant case, it was never disputed that the accused was carrying P10(c) that contains dangerous drugs prior to the accused placing the exh P10(c) to undergo security clearance at the scanning counter No 99. It was also not disputed that the accused had just arrived in KKIA T1 from Hong Kong via Malaysia Airline Flight MH385. Exhibit P10(c) was registered under the name of the accused having reference to the luggage tag exh P10(a). Nothing to indicate that the accused denying at any material time that exh P10(c) was not hers either through any evidence of the prosecution witnesses or cross-examination nor 'put' question by learned counsel.

[119] However, DW1 denied any knowledge of the presence of drugs inside the box she was carrying. The premise of DW1 defence is that she was asked by one African man named Clitin to carry the box to Kuala Lumpur to be given to his elder brother on the pretense that the box contains clothes and women(s) accessories.

[120] She was, but only and 'innocent carrier'.

[121] This refers to a situation where the accused admit carrying the box (exh P10(c)) containing the dangerous drug but dispute having knowledge of the drug.

[122] The explanation by the accused in her defence gave the inference that Citlin was the actual trafficker and the accused was only the innocent carrier.

[123] The prosecution relies on s 37(d) of the Act to prove possession and had successfully proven at the prima facie stage that the accused had in his custody or control of the box, therefore with the aid of the statutory presumption in s 37(d) she would be deemed to be in possession of the subject methamphetamine and that the accused traffic in the said methamphetamine in line with the definition of trafficking under s 2 of the DDA.

[124] The presumption under s 37(d) applies and duly invoked by this court, the accused now bears the legal burden of proving absence of knowledge on the balance of probabilities by admissible evidence.

[125] In the instant case, burden to prove defence of no knowledge of which the consequence of a failure to rebut a statutory presumption of fact which forms a necessary factual ingredient of the offence would be a conviction.

[126] For all intents and purposes, the defence of no knowledge is a defence that the accused was not even in possession of the drug.

[127] The accused upon being called to enter her defence under the offence of s 39B(1)(a) of the DDA 1952, raised the defence of 'innocent carrier' and contended that she had no knowledge of the dangerous drugs found inside the bottom part of the cooker placed inside the box she was carrying. She only found out that it was not clothing and women's accessories until the custom officer, PW3 told her that she was bringing illegal things ie drugs.

[128] The act of DW1 blatantly following the instruction of Ciltin falls squarely within the ambit of the principle of 'Wilful blindness' mentioned by the learned DPP in his written submission at the completion of trial and I am in accord with him, following the case of *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240; *Nguyen Thi Thu lwn Pendakwa Raya* [2015] MLJU 872 and *Sarumathi Rengasamy v Public Prosecutor* (Criminal Appeal No P-05–248-10 of 2013) (unreported).

[129] From here, I will only reiterate learned prosecution written submission (ref: submission of PP at the close of prosecution case — pp 1827) as I am in full accord with his reasoning or justification as to why DW1's defence failed to create doubt to the prosecution's case. Instead, her uncorroborated evidence invited the court to find her story as being tailor fit to allow her to escape from the gallows on being caught and subsequently tried.

[130] Based on the above mentioned cases DWI's testimony in comparison to the former, if one is to believe DW1, clearly the whole arrangement invites suspicions to arouse the least, the need for further inquiries, but here DW1 deliberatedly chooses not to make those inquiries or in self denial of such suspicions.

[131] I will only deliberate here the conspicuous falsification for justification as to why DW1's defence cannot be believed so to create a reasonable doubt against the prosecution case:

(a) neither can one describe DW1 as to be intelligent or unintelligent, I had the pleasure of observing her during the trial and hearing her, when she gave evidence sitting at the witness box. She appeared calm during the prosecution case and also when adducing her defence. But such appearances are the norm displayed by those who came before this court on similar charges. Therefore one cannot judge by observing just by their attitude but their defence more than not would reveal the truth as to the matter at hand;

(b) now, coming back to DW1 who knew that a crime of drug trafficking in Malaysia is serious in nature (at p 104 of the NOP) and that alone would indicate that she had general knowledge and not oblivious about what is happening around her. Therefore common sense would detect that she should have taken diligent steps to ensure that one shouldn't just easily accept, like in the instant case a box to carry to Malaysia. Specially, the African man who handed the box to her at the China Hotel in Guangzhou who is a complete stranger to her and even weirder that she still did not know his name to this date;

(c) the only excuse she could justify her action was that this unknown African man was told by her internet 'dateline' friend named Clitin whom she knows only via internet for about a period of three months and never met in person; asked her to meet up with his friend, the unknown African man where the said man will hand over the box to her. This box Clitin said, to content clothing and women's accessories. Clitin requester her to bring it to Malaysia and there to be given to his elder brother in Kuala Lumpur;

(d) DW1 said she was given by this unknown African man (otherwise Clitin's friend) the sum of USD400, RMB300, return airline ticket from Hong Kong to Malaysia and a reload mobile card for her to use once she arrived in Malaysia to call him (the unknown African man) for further direction;

(e) DW1 is currently married with one daughter both of them living in China with her, then. She took this assignment without telling her husband and took flight to Malaysia on the 17 August 2014 also without her husband knowledge. She said she left her daughter who was unwell earlier but just since recovered with her mother; and

(f) fnally, she herself agreed that there was no one prohibiting her to open and check the contents of the box (P10(c)). But in spite of all these, she did not do anything to verify the contents of the said box and wilfully blind herself to these highly suspicious assignment instructed by Clitin and his friend (the unknown African). The former she had never met in person and the latter though she met him to receive the box for the very first time and a complete stranger to her up to this date she was never introduce by his name thus, I coined the words 'the unknown African'.

[132] Basically, that is the gist of DWI's defence/story. In my respective opinion, although Clitin and the friend character does exsits and may as well be the trafficker, but at the same instance the accused is a volunteer 'mule' who knowingly agreed to carry the box containing drugs for a sum of money, as well as being provided with a free flight and accommodation. The rest of her defence remains ficticious.

A DECISION OF THE COURT AT THE CONCLUSION OF THE TRIAL

[133] I find that the defence had failed to raise reasonable doubt on the prosecution's case. It is uncorroborated and highly improbable and the defence had also failed to rebut the statutory presumption of knowledge under s 37(d) of the DDA.

[134] Therefore the failure of the accused to cast a reasonable doubt in the prosecution case's on the essential ingredients of the charge and her failure to rebut the statutory presumption of knowledge under s 37(d) of the DDA on the balance of probabilities show that the prosecution at the end of the defence case the prosecution has proved its case beyond reasonable doubt. Accordingly, at the close of the defence case, I find the accused is guilty of having in her possession 336g of methamphetamine and trafficking in that quantity of drugs. She accordingly stands convicted of the offence of 'trafficking' of 336g of methamphetamine under s 39B(1)(a) of the DDA 1952 and punishable under s 39B(2) of the same Act ie sentence to death by hanging.

Accused convicted of the offence of trafficking and sentenced to death.

Reported by Kohila Nesan